Re Tengku Ibrahim bin Hussein; ex p United Malayan Banking Corp Bhd

HIGH COURT (KUALA TERENGGANU) — BANKRUPTCY NO 29–284 OF 1990
ABDUL KADIR SULAIMAN J
9 OCTOBER 1999

Bankruptcy *— Petition — Validity of creditor's petition — Petitioner did not state holding of security for payment of debt — Judgment debtor claimed judgment creditor entered caveat on land and was a secured creditor — Whether lien in favour of judgment creditor — Bankruptcy Rules 1969 Form 9*

The respondent obtained a final judgment against the appellant and instituted bankruptcy proceedings against him. The appellant's application to set aside the respondent's bankruptcy notice, creditor's petition and for an injunction to prevent the respondent from obtaining receiving and adjudication orders against him was dismissed by the senior assistant registrar. The appellant appealed contending that as the respondent failed to disclose in the creditor's petition that it held any security on the appellant's estate for the payment of debt, the respondent's creditor's petition was defective in its failure to comply with the requirement in the prescribed Form 9 of the Bankruptcy Rules 1969 by omitting to disclose the particulars required under item 3 of the said form. It was contended that the failure to disclose the said information rendered the creditor's petition void as the respondent was a secured creditor in respect of the debt on the account of the entry of a caveat on the appellant's property. The respondent submitted that by entering a caveat on a particular land, it did not turn a caveator into a secured creditor as defined by s 2 of the Bankruptcy Act 1967 ('the Act'). In reply, the appellant contended that the respondent's caveat was a lien on the property of the appellant and was thus caught by the definition of 'secured creditor' in s 2 of the Act.

Held, dismissing the appeal with costs:

(1) There was no evidence at all to support the contention of the appellant that the respondent had caveated the appellant's land to render its Form 9, which was the creditor's petition, defective as the caveat was entered by a third party who had no connection to the respondent (see p 606B–D).

(2) Even if the caveat was entered by the respondent, the appellant failed to provide evidence to show that the appellant's issue document of title had been deposited with the respondent as security for the creation of a lien, or to conclusively point to the fact that there was a notice in respect of a lien-holder's caveat so as to constitute the respondent as a secured creditor whose failure

to disclose the information in Form 9 rendered its creditor's petition void (see p 607A, G–H). A

[Bahasa Malaysia summary

Responden telah memperolehi penghakiman muktamad terhadap perayu dan memulakan prosiding kebankrapan terhadapnya. Permohonan perayu untuk mengetepikan notis kebankrapan, petisyen pemiutang dan suatu injunksi untuk menghalang responden daripada memperolehi perintah penghukuman dan penerimaan terhadapnya telah ditolak oleh penolong kanan pendaftar. Perayu telah merayu dengan menegaskan bahawa oleh kerana responden gagal menunjukkan di dalam petisyen pemiutang bahawa ia memegang apa-apa cagaran di atas estet perayu untuk pembayaran hutang, petisyen pemiutang responden adalah defektif di dalam kegagalannya untuk mematuhi keperluan yang diperuntukkan di dalam Borang 9 Kaedah-Kaedah Kebankrapan 1969 dengan ketinggalan untuk menunjukkan butir-butir yang dikehendaki di bawah item 3 borang tersebut. Adalah ditegaskan bahawa kegagalan untuk mendedahkan maklumat tersebut telah menyebabkan petisyen pemuitang tersebut batal kerana responden adalah pemiutang bercagar berkenaan dengan hutang tersebut berdasarkan kemasukan kaveat di dalam tanah perayu. Responden menghujahkan bahawa dengan kemasukan kaveat di atas sesuatu tanah ia tidak menjadikan pengkaveat sebagai pemiutang bercagar seperti yang diperuntukkan di dalam s 2 Akta Kebankrapan 1967 ('Akta tersebut'). Sebagai membalas, perayu telah menegaskan bahawa kaveat responden adalah lien ke atas tanah perayu dan dengan itu terjatuh di bawah definisi 'pemiutang bercagar' di dalam s 2 Akta tersebut.

B C D E F

Diputuskan, menolak rayuan dengan kos-kos:

(1) Tiada keterangan langsung untuk menyokong penegasan perayu bahawa responden telah masukkan kaveat ke atas tanah perayu untuk menjadikan Borang 9 yang merupakan petisyen pemiutang defektif kerana kaveat dimasuki oleh pihak ketiga yang tiada kaitan dengan responden (lihat ms 606B–D). G

(2) Sekalipun jika kaveat dimasuki oleh responden, perayu gagal untuk memperuntukkan keterangan untuk menunjukkan bahawa dokumen hak milik perayu telah didepositkan dengan responden sebagai cagaran untuk mewujudkan lien, atau membukti secara secara konklusif bahawa terdapat notis berkenaan dengan kaveat pemegang lien agar menjadikan responden sebagai pemiutang bercagar di mana kegagalannya untuk mendedahkan maklumat di dalam Borang 9 menjadikan petisyen tersebut batal (lihat ms 607A, G–H).] H I

Notes

For cases on validity of creditor's petition, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1905–1922.

Legislation referred to

Bankruptcy Act 1967 ss 2, 3(1)(i), 5(2)
Bankruptcy Rules 1969 Form 9
National Land Code 1965 ss 281(1), 330(1)–(4), Form 19A

R Mehta (*Mehta & Co*) for the appellant.
SP Teo (*KP Ong Teo & Lim*) for the respondent.

Abdul Kadir Sulaiman J: This is an appeal by the judgment debtor against the decision of the learned SAR given on 22 June 1999 firstly, dismissing his application by a notice of motion made on 15 October 1991, praying for the bankruptcy notice and the creditor's petition of the judgment creditor be set aside and an injunction be issued against the judgment creditor from obtaining a receiving and an adjudication orders against him, and secondly, making receiving and adjudication orders against the appellant upon the creditor's petition. The receiving and the adjudication orders were made upon the dismissal of the said application of the appellant.

On 27 June 1990, a bankruptcy notice was issued against the appellant for a sum of RM116,513.08. The sum arose out of an order of court of 16 March 1987 entering final judgment against him in High Court Kuala Terengganu Civil Suit No 341 of 1985 to pay the judgment creditor the sum of RM25,484.67 with interest at 14.5% from 27 November 1984 till full realization and RM45,000 together with interest of 8% pa from 31 May 1984 till full realization and an agreed costs in the sum of RM150, and which execution thereon not having been stayed.

Upon the failure of the appellant to comply with the terms of the bankruptcy notice, on 26 November 1990, the judgment creditor filed a creditor's petition against him on the ground of s 3(1)(i) of the Bankruptcy Act 1967 ('the Act'). On 15 October 1991, the appellant filed the above application resulting in the impugned decision of the learned SAR which is the subject matter of this appeal. His application is supported by an affidavit affirmed by him on 2 October 1991. Firstly, it is alleged that the respondent failed to disclose in the creditor's petition that it held any security on the appellant's estate for the payment of the debt. Hence, it is contended that the creditor's petition of the respondent is defective in its failure to comply with the requirement in the prescribed Form 9 in omitting to disclose the particulars required under item 3 of the said form.

On the issue of the respondent holding the security on the appellant's estate for the payment of the debt due, it is explained in the said affidavit in support that the respondent had entered a caveat upon the appellant's landed property GM 181 Lot No 1918 in the Mukim of Batu Buruk in the State of Terengganu since 6 February 1986. Exhibit 'B1' is a copy of

Form 19A of the National Land Code 1965 ('the NLC') which is a notice of the entry of the caveat. The affidavit in support goes on to state that as the entry of the caveat is irregular it has prevented the appellant from having the opportunity to sell the said property to settle the debt of the respondent in proper time thereby preventing the interest on the debt from accumulating. For the defect in the process of caveating his land the respondent should be estopped from imposing any interest on the debt from the date of the entry of the irregular caveat on his land which is 6 February 1986. In his further affidavit affirmed by his solicitor, Chew Saw Kooi, the appellant provided evidence that there was an offer made by Sulaiman bin Ibrahim, a prospective buyer, to buy the said property of his in September 1992 for RM90,000 which would have been sufficient to settle the total debt then due to the respondent.

At the hearing of this appeal, To' Puan Mehta on behalf of the appellant informed the court that she is proceeding only on the defect of the creditors petition in failing to comply with the requirement stipulated in the prescribed Form 9 by failure to disclose the particulars required by para 3 thereof. The amount claimed in the bankruptcy notice is not in dispute. She contends that the failure to disclose the information required in para 3 of Form 9 renders the creditor's petition void as the respondent is a secured creditor in respect of the debt on account of the entry of the caveat on the appellant's property mentioned earlier. The debt which is the subject matter of the creditor's petition is in relation to a trust receipt amounting to RM45,000 which is protected by the caveat. By the entry of the caveat the respondent had constituted itself a secured creditor which by s 5(2) of the Act the respondent must in its petition either state that it is willing to give up its security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of its security. In the latter case it may to the extent of the balance of the debt due to it, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if it were an unsecured creditor. Therefore, being a secured creditor, its failure to disclose this information in the creditor's petition is fatal. Hence, the petition must be set aside.

In reply, En Teo on behalf of the respondent submitted that by entering a caveat on a particular land it does not turn a caveator into a secured creditor as defined by s 2 of the Act to mean a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of a debtor before judgment. He submitted that a secured creditor as envisaged by s 2 is one who by the security he holds, upon the default of the landowner, he is able to exercise his right to sell off the land to recover the debt due to him by the landowner. However, the effect of a caveat is merely to prevent the landowner from dealing with the said property for so long as the caveat is in force. The caveator has no power to dispose off the property to recover the debt due by the caveatee. In any event, the said caveat over the appellant's land has expired by now. The caveat expired by affluxion of time in 1992. That being

so, it was not incumbent upon the respondent to supply the particulars required by para 3 of Form 9.

The following are the requirements of para 3 thereof:

> That I (or we) do not, nor does any person on my (or our) behalf hold any security on the said debtor's estate, or on any part thereof, for the payment of the said sum.
>
> Or
>
> That I hold security for the payment of (or part of) the said sum (but that I will give up such security for the benefit of the creditors of ..... in the event of his being adjudged bankrupt) (or and I estimate the value of such security at the sum of $.....).
>
> Or
>
> That I, ..., one of your petitioners, hold security for the payment of, etc.

In her final reply, the learned counsel for the appellant contends that the said caveat of the respondent is a lien on the property of the appellant. Hence, it is caught by the definition of 'secured creditor' in s 2 of the Act.

Indeed, under the definition, a secured creditor includes a lien holder on the property of a debtor. If that be so, it is appropriate to consider whether the purported caveat of the respondent constituted the respondent as the lien holder on the property of the appellant. As stated earlier in this judgment, exh 'B' is a copy of a notice of the entry of a caveat over the appellant's land. The said exhibit is a copy of the notice issued to the appellant, as the proprietor of land held under GM 181 Lot No 1918 in the Mukim of Batu Buruk by the Registrar/Land Administrator Kuala Terengganu informing him of the entry of a private caveat/lien-holder's caveat upon the register document of title to the said land. The caveat is expressed to bind the land itself/the particular interest described in the schedule and the effect thereof is 'telah bersetuju menerima kemudahan 'Trust Receipt' sebanyak RM45,000 atas cagaran tanah tersebut'. The notice was dated 6 February 1986. A copy of the said notice was extended to:

> Nik Mohd Ghazi bin Nik Mohd Kamil
> d/a Tetuan Adnan & Wee,
> Peguambela & Peguamcara, Kuala Terengganu.
> (AW/84/8450/UMBC/IWCH).

Of significance, as disclosed by this notice is that the said caveat was registered upon the register document of title to the said land upon the application of 'Nik Mohd Ghazi bin Nik Mohd Kamil, K/P 2639085'. There is nothing in the evidence proffered by the appellant or from the notice itself to suggest any connection between this Nik Mohd Ghazi and the respondent, United Malayan Banking Corp Ltd. He has not filed any affidavit in this proceedings relating to this application of the appellant before the learned SAR to find an inference that he is acting on behalf of the respondent or that this caveat was entered on behalf of the respondent. Neither was there any evidence before the learned SAR coming from Tetuan Adnan & Wee, Peguambela & Peguamcara Kuala Terengganu connecting the caveat with the respondent. As to the trust receipt of

RM45,000, mentioned in the notice, it is lacking in particulars to enable it to be connected to item (c) in the particulars of debts mentioned in the bankruptcy notice issued by the respondent.

It may be argued that this issue was never raised by the parties in this appeal. But being central to the dispute as to the status of the purported caveat of the respondent, the court cannot put on blinkers to cover its eyes from establishing the realities. The existence of a valid caveat of the respondent is important in determining the fate of this appeal by the appellant. If there is no valid caveat of the respondent in the first place, the application of the appellant before the learned SAR must necessarily fail, so is this appeal, because the appellant is relying on the fact that the respondent is a secured creditor who had failed to disclose the facts in its creditor's petition. If there is no caveat, without having to determine whether it constitutes the respondent as a secured creditor in respect of the debt, the contention of the appellant as regards the requirement of Form 9 must necessarily fail. Upon the analysis as stated earlier this court finds that there is no evidence at all to support the contention of the appellant that the respondent had caveated his said land to render its Form 9 which is the creditor's petition defective. On this ground alone, this appeal of the appellant must fail.

For one moment, if indeed there was this caveat of the respondent upon the land of the appellant as evidenced by exh 'B'. The issue to consider next is whether this caveat constitutes a lien on the property of the appellant thereby turning the respondent into a secured creditor within the meaning of s 2 of the Act. According to exh 'B' the register document of title to the land of the appellant has been entered with 'suatu Kaveat Persendirian/ Kaveat Pemegang lien'. The said exhibit is in Form 19A to the NLC. This form is a common usage in respect of a registrar's caveat, a private caveat or a lien-holder's caveat. However, in this case, in respect of a registrar's caveat there was a deletion. But as for a private caveat and lien-holder's caveat there was no deletion of either leaving it to be applicable for a private caveat and lien-holder's caveat, except for the fact that it is stated in the notice that the caveat is expressed to bind the land and the effect thereof is 'telah bersetuju menerima kemudahan "Trust Receipt" sebanyak RM45,000 atas cagaran tanah tersebut.' Taking it to be a lien-holder's caveat, what is evidence that it is so? In order to be a lien-holder's caveat, there must first be a creation of a lien. Section 281(1) of the NLC provides as follows:

> (1) Any proprietor or lessee for the time being may deposit with any other person or body, as security for a loan, his issue document of title or, as the case may be, duplicate lease; and that person or body —
>
> (a) may thereupon apply under chapter 1 of Part Nineteen for the entry of lien-holder's caveat; and
>
> (b) shall, upon the entry of such a caveat, become entitled to a lien over the land or lease.

It would appear, therefore, that to create a lien, the appellant is required to deposit with the respondent as security for the trust receipt, his issue

document of title. This piece of evidence was not forthcoming from the appellant who bears the burden to establish such evidence. The evidence from the entry in exh 'B' would not suffice to infer that the appellant's issue document of title had been deposited with the respondent as required by s 281(1) of the NLC because the failure to delete the phrase 'a private caveat' therein had created an ambiguity.

Having had the appellant's issue document of title deposited in it, the respondent may apply for the entry of a lien-holder's caveat over the land of the appellant as required by s 330 of the NLC. Sections 330(1) to (4) states as follows:

> (1) Any person or body with whom the issue document of title to any land, or any duplicate lease, has been deposited as security for a loan may, as provided in s 281, apply to the Registrar under this section for the entry of a lien-holder's caveat in respect of the land or lease in question.
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> (2) Any such application shall be in Form 19D, duly attested in accordance with the provisions of s 211, and shall be accompanied by the prescribed fee, and the issue document of title or, as the case may be, duplicate lease.
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> (3) The Registrar shall note on any such application the time at which it was received (being, in the case of any application sent by post, the time at which it was withdrawn from its cover in the Registry or, as the case may be, Land Office) and, unless he is prohibited from doing so by any Registrar's caveat, private caveat, trust caveat or prohibitory order, shall as soon as may be thereafter —
>
> (a) enter the caveat applied for on the register document of title to the land in respect of which, or a lease of which, it is to have effect; and
> (b) serve a notification in Form 19A on the proprietor of that land or, as the case may be, the person or body for the time being entitled to the benefit of the lease in question.
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> (4) The entry of a lien-holder's caveat on any register document shall be effected by the endorsement thereon, under the hand and seal of the Registrar, of the words 'Caveat (Lien)', together with a statement specifying —
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> (a) whether the caveat binds the land itself, or a lease thereof only;
> (b) the person or body on whose application it was entered;
> (c) the time from which it is effective (being the time of receipt of the application, as noted thereon pursuant to sub-section (3)); and
> (d) the reference under which the application is filed.

In the light of the ambiguity created by exh 'B' of the appellant, the said exhibit cannot conclusively point to the fact that it is a notice in respect of a lien-holder's caveat so as to constitute the respondent as a secured creditor whose failure to disclose the information in Form 9 renders its creditor's petition void.

For the above reason, I dismiss the appeal of the appellant and affirm the decision of the learned SAR of 22 June 1999 dismissing his application of 15 October 1991, praying for the bankruptcy notice and the creditor's petition of the judgment creditor be set aside and an injunction be issued against the judgment creditor from obtaining a receiving and an

adjudication orders against him, and secondly, I also affirm the making of a receiving and adjudication orders against the appellant upon the debt. Costs to the respondent.

Appeal dismissed with costs.

Reported by Chin En Tek